IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 226 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAGWANBHAI BHAPULBHAI TANDEL
Versus
BHIKHABHAI BHAPULBHAI TANDEL AND ANOTHER

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Appearance :
MR DAKSHESH MEHTA for the Appellant
MR CHETAN P PANDYA for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 07/02/2007

ORAL JUDGMENT:

By filing this appeal from order under Order 43 Rule 1 of the Civil Procedure Code the appellant who is the original plaintiff of Regular Civil Suit No.119 of 1989 has challenged the order of remand passed by

the appellate Court in Regular Civil Appeal No.110 of 1997. The appellant plaintiff instituted the aforesaid suit for dissolution and accounts of the partnership firm. The case of the plaintiff in the suit was that the plaintiff and the defendants had formed a partnership for doing fishery business. The partnership was entered into on 5.4.1985 and it was a partnership at will. It is the case of the plaintiff that the plaintiff and the defendants Nos.1, 2 and 3 each having one-fourths share in the business of the partnership but the defendants nos.2 and 3 are not giving accounts and, therefore, the plaintiff gave intimation to the other defendants for the purpose of dissolving the partnership firm and on that basis ultimately the suit was filed for dissolution of the partnership firm and for accounts and for recovering the amount in question.

The learned trial Judge passed the preliminary decree, which was challenged by defendant No.2 by preferring appeal before the District Court. The learned appellate Judge allowed the said appeal by setting aside the order of the trial Court and remanded the matter to the trial Court for determining the question in respect of the condition precedent about whether any condition precedent mentioned in the agreement is fulfilled before dissolving the firm. It is aforesaid remand order which is challenged in the present appeal from order by original plaintiff of the suit.

Mr Dakshesh Mehta, learned advocate for the appellant submitted that the appellate Court has committed an error in remanding the matter as from the available material on record the appellate court could have decided the matter. He further submitted that it is a partnership at will and the partnership firm would stand dissolved upon institution of the suit itself. Even the notice of dissolution was also given by the plaintiff. He further submitted looking to the fact that the suit is of the year 1989

and therefore the learned appellate Judge should have decided the appeal instead of remanding the matter to the trial Court.

Mr Chetan Pandya, learned advocate for the respondent No.1 – original defendant No.2 submitted that he has no objection if the appellate Court decides the appeal as per the evidence available on record of the case, instead of remanding the matter back to the trial Court.

So far as power of remand by the appellate court is concerned, it is provided under Order XLI Rule 23A of the Civil Procedure Code, which reads as under:-

> "23A Remand in other cases: Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."

Order XLI Rule 24 provides that where the evidence brought on record is sufficient to enable the Appellate Court to pronounce the judgment, the Appellate Court may after resettling the issues finally determine the suit notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds. Considering the reasoning of the Appellate Court, in my view, this is not a case in which the matter was required to be remanded to the trial Court as it may prolong the proceedings further. It is not in dispute that the partnership at will stood dissolved in view of the filing of the suit for accounts and separate share. Under these circumstances, the learned Appellate Judge can himself interpret the partnership deed and other

documents and can come to his own conclusion. Even the learned Appellate Judge could have called for some additional evidence by retaining the matter with him, if so required. Under the circumstances, when it is possible for the Appellate Court to pronounce the judgment on available evidence on record and if the material on record is sufficient to decide the issue, it is not necessary for the Appellate Court to remand the matter to the trial Court. Considering the provisions of law contained in Order XLI Rule 23A and 24 of the Civil Procedure Code more especially when no cogent reasons are given by the learned Appellate Judge for remanding the matter. In that view of the matter, this appeal is allowed by setting aside the order of the Appellate Judge. Regular Civil Appeal No.110 of 1997 shall now stand restored to the file of the District Judge, Navsari and the learned Appellate Judge shall decide the appeal on merits. It is clarified that this Court has not expressed any opinion on the merits of the matter and it is for the Appellate Court to decide the appeal on available evidence on record.

In view of the order passed on main appeal, no order is required to be passed on Civil Application No.3991 of 2005.

(P.B.MAJMUDAR, J.)

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